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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1983

ABRAHAM A. GAMMAL,
PETITIONER,

v.

JAMES HAMROCK, et al.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

Questions Presented for Review

I. Whether the Court of Appeals erred in affirming the District Court's judgment granting summary judgment to the respondents on grounds that issues raised by petitioner's administrative appeal were moot as a result of the decision in *Gammal* v. *Merit Systems Protection Board*, 671 F.2d 654 (1st Cir. 1982).

II. Whether the Court of Appeals erred in affirming the District Court's judgment for respondents on grounds that *Bush* v. *Lucas*, ____ U.S. ____, 103 S.Ct. 2404 (1983) defeated petitioner's cause of action.

List of All Parties

The petitioner herein is Abraham A. Gammal. The respondents herein are James Hamrock, Kenneth Salk, Edward Pollack, Edward T. Martin, Ruth D. Prokop and Ersa Poston.

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Petitioner, Abraham A. Gammal, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on November 30, 1983.

Opinions Below

The opinion of the Court of Appeals for the First Circuit has not been published in official reports. A copy of the opinion is attached hereto as Appendix A (A-1). The opinion of the United States District Court for the District of Massachusetts has not been published in official reports. A copy of the opinion is attached hereto as Appendix B (B-1).

Jurisdiction

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1) to review a judgment of the Court of Appeals by Writ of Certiorari. Judgment was entered in the Court of Appeals for the First Circuit on November 30, 1983.

Constitutional Provisions

The following provisions of the United States Constitution are involved: U.S. Const. Amend. I and V. The text of those provisions are set forth in Appendix D (D-1).

Statement of the Case

The Petitioner, Abraham A. Gammal, re-entered the United States Civil Service in 1970 as a maintenance engineer (GS-13) in the Boston Area Office of the Department of Housing and Urban Development (H.U.D.). Mr. Gammal supervised the work of a small staff of maintenance engineering personnel including GS-12 maintenance engineers whose duties included monitoring the records and performance of various local housing authorities which received government funds. Mr. Gammal consistently received satisfactory or better performance ratings.

On April 16, 1977, Mr. Gammal sent a mailgram to President Carter outlining what he felt to be a pattern of waste and mismanagement within his agency.

After the April mailgram, the respondents began a calculated campaign to force Mr. Gammal out of H.U.D. Numerous punitive actions were taken against him including the transfer of one of his engineers from his jurisdiction, the denial of within-grade salary increases, a *de facto* reduction in rank by the removal of his supervisory functions, his suspension from service, an investigation of him by the Regional Inspector General, and a compelled psychiatric fitness for duty examination. Lastly, in September, 1978, Mr. Gammal was terminated, ostensibly because of a reduction in force. On November 29, 1978, the United States Civil Service Commis-

sion concluded that Mr. Gammal's position "... was abolished as an act of reprisal or retaliation for his legitimate 'whistleblowing' activities rather than for reasons of efficiency or economy, lack of work or funds or because of the agency-wide reorganization." His separation was ordered cancelled.

In a purported attempt to comply with the decision of the Civil Service Commission, H.U.D. offered Mr. Gammal another GS-13 level position. Mr. Gammal refused to accept the job offer because the new position was not of like "seniority, status and pay" as compared to his old position. Mr. Gammal's contention was that the cancellation of his separation should have resulted in his restoration to his old position as it existed prior to the onset of the reprisals taken against him, or to one of like seniority, status and pay. Thus, the cancellation and restoration requirements of the Civil Service Commission had not been met. Mr. Gammal did not possess the requisite technical capability for the position offered, and believed that he was being "set up" for future removal actions based on charges of incompetence and inefficiency. *Gammal* v. *Merit Systems Protection Board and Department of Housing and Urban Development*, 617 F.2d 654 (1st Cir. 1982), hereinafter *Gammal I*. Given the finding of the Civil Service Commission in its November 29, 1978 opinion, that H.U.D.'s offer to Mr. Gammal of a position requiring his relocation in Washington, D.C. "... was made in order to get rid of him in the Boston Region where he had been a source of irritation and aggravation to management", Mr. Gammal's fears were not groundless.

Mr. Gammal refused to accept H.U.D.'s offer and the agency declared him to be A.W.O.L. Removal proceedings were commenced on September 8, 1980. The Merit Systems Protection Board affirmed the removal of Mr. Gammal from his position. Mr. Gammal appealed and because of the provisions of the Civil Service Reform Act of 1978 (P.L. 95-454) his appeal was heard by the Court of Appeals rather than by the District Court.

In 1977, prior to the onset of the removal proceeding, Mr. Gammal appealed the *de facto* reductions in rank to the Civil Service Commission. Without giving him the required hearing, the Commission refused to consider his appeals, stating that "a reduction in rank can only occur when the employee is moved from one position to another by an official personnel action". And it further concluded that "...whatever happened on August 16, 1977, did not require an official personnel action which is necessary when an employee is moved from one position to another and is a prerequisite to a finding of a reduction in rank." The Commission refused to consider Mr. Gammal's allegations of harassment by his supervisors stating that it was "not a relevant point."

In the Summer of 1979, prior to the onset of the removal proceedings in the Fall of 1980, Mr. Gammal filed suit against his employers in the District Court. Count One of his Complaint was an appeal, under 5 U.S.C. §7501 *et seq.*, and 5 U.S.C. §701 *et seq.*, from various adverse administrative decisions, including the *de facto* reduction in rank. By Count One, Mr. Gammal sought reinstatement to his job, back pay and benefits, expungement of adverse entries in his personnel records, and costs and attorney's fees. By Count Two of the complaint, Mr. Gammal sought damages from several individual H.U.D. employees for violations of his First and Fifth Amendment rights and for violations of his civil rights under 42 U.S.C. §1985(1). These proceedings shall hereinafter be referred to as *Gammal II*.

After filing an Answer in November, 1980, the United States Attorney's Office filed its Motion for Summary Judgment. The magistrate hearing the case rendered judgment for the respondents on January 14, 1983. Mr. Gammal appealed to the United States Court of Appeals for the First Circuit pursuant to the provisions of 28 U.S.C. §636(c)(1) and (3). Judgment was entered against him by the Court of Appeals on November 30, 1983.

Reasons for Granting the Writ

A. The Court of Appeals' Decision in *Gammal II* That Petitioner's Appeal to the District Court of the Denial of the Civil Service Commission To Hear His Allegations of a *de facto* Reduction in Rank on Grounds That Those Claims Were Moot Was Erroneous.

The Court of Appeals found that Mr. Gammal's case had become moot as a result of its prior decision in *Gammal I*, where it had previously upheld petitioner's termination on grounds that he was A.W.O.L. (A. 4). The Court went on to state that "[b]ecause of the discharge, no relief on the *de facto* reduction-in-rank claim is now possible" (A. 4). In *Gammal I*, the Court of Appeals limited its review to only the Civil Service Commission ruling before it, stating explicitly that it was not "passing on the merits of the holding that appellant's putative new position was of like seniority, status, and pay to the old one..." *Gammal I*, *supra* at 656, ft. 1.

This Court has held that "[t]he burden of demonstrating mootness is a heavy one." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). In the *Davis* case, two conditions for a finding of mootness were set forth. The first is that "there is no reasonable expectation that the alleged violation will recur." The second is that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation". *Id.* at 631.

In the instant case, the Court of Appeals erroneously concluded that both prongs of the test had been met. The effects of the "alleged violations" have not been eradicated. Mr. Gammal carries with him the stigma of the adverse personnel actions which appear on his employment record. His record of years of loyal government service has been sullied. Even if reinstatement is not possible, Mr. Gammal is entitled to clear his records and his name. The ability to clear one's reputation

in the community has long been recognized as an important function of our legal system. *Parker* v. *Ellis*, 362 U.S. 574, 594 (1960). The Court of Appeals has denied Mr. Gammal that right.

The *de facto* reduction in rank issue is important in two respects. First, independent of any constitutional claim or civil rights allegations, Mr. Gammal should be heard on his appeal from the refusal of the civil service agencies to consider his *de facto* reduction-in-rank claim.

The fact that Mr, Gammal's altered 1977 position description was almost identical to that of the other maintenance engineers is not controlling. In *Hurley* v. *United States, et al.*, 575 F.2d 792, 798 (10th Cir. 1978), the Court observed "...as between duties and responsibilities actually performed and those merely listed in obsolete job descriptions, but not performed, the former must carry greater evidentiary weight in any rational standard of what determines grade-controlling duties". Therefore, the position description is only one of several factors which must be considered.

Furthermore, as the *Hurley* Court concluded, when an employee's duties, those actually performed, change or erode, it is the duty of the agency to reclassify or take appropriate reduction-in-force action. *Id.* at 794. The 1977 change in Mr. Gammal's duties was never the subject of an adverse personnel or reduction-in-force action as required. His duties were unilaterally changed without his approval to eliminate his supervisory functions. In *Fucik* v. *United States*, 655 F.2d 1089, 1094 (Ct. Cl. 1981) the Court found that,

> "there can be a reduction of rank even where the employee has not been reduced in grade. If plaintiff's new position was overgraded...then this transfer would be an instance of reduction in rank without reduction in grade. The consequence would be that plaintiff would have suffered an adverse action without being provided the required procedural safeguards.... Such action will be set aside as unlawful."

The *Fucik* Court also determined that,

> "[t]he motive of the agency is relevant . . . in determining whether agency action is arbitrary, capricious or an abuse of discretion . . . . When an employee is reassigned to a position in the hope of coercing his resignation, the action is unlawful and may be set aside even though it is not an adverse action because there has been no reduction in rank or pay. That result follows because the intent of coercing resignation is an unlawful motive for agency action, constitutes bad faith, and is an abuse of discretion." *Id.* at 1096.

Mr. Gammal's allegations of harassment by the defendants were incorrectly deemed irrelevant by the Civil Service Commission. He was found not to have been reduced in rank because no substantive changes had been made in his position description and no formal personnel action had been taken. Clearly these findings are erroneous in light of the decisions in *Hurley* and *Fucik*.

In *Pauley* v. *United States*, 419 F.2d 1061 (7th Cir. 1969) the plaintiff protested that his transfer constituted a reduction in rank although his new position was of the same GS rating as the old position. The *Pauley* Court determined that "[a] reduction in rank requires the same procedural steps as in the case of a discharge". *Id.* at 1065. In the *Pauley* case, the Court concluded that the procedural requirements had been met since the plaintiff had been afforded a full hearing on the reduction in rank issue in conjunction with the removal proceedings which had been instituted against him. Unlike Mr. Pauley, Mr. Gammal has never been afforded the necessary procedural safeguards, including a hearing, on the issue of whether or not he suffered a reduction in rank. 5 U.S.C. §7701. The administrative failure to accord Mr. Gammal a hearing was continued in the Courts. Mr. Gammal has never been afforded a hearing in any forum on the reduction-in-rank issue.

The changes wrought by the Civil Service Reform Act of 1978, Pub. L. 95-454, acted to the detriment of Mr. Gammal. By that Act, in January, 1979, the U.S. Civil Service Commission became the Merit Systems Protection Board. Before the date of implementation, appeals from the U.S. Civil Service Commission were to the district courts. After implementation, appeals from the new Merit Systems Protection Board went to the court of appeals. 5 U.S.C. §7703.

Thusly, Mr. Gammal's civil rights action and the administrative appeals from all the adverse personnel actions, with the exception of the second termination issue, were before the District Court. The final termination appeal which was finally decided by the Merit Systems Protection Board after the filing of Mr. Gammal's district court action could only be taken to the Court of Appeals. The Civil Service Reform Act made it impossible for Mr. Gammal to have all the components of his case heard in one forum.

The prejudice caused to Mr. Gammal is readily apparent. The Court of Appeals in *Gammal I* declined to consider whether or not the new job Mr. Gammal was given was of like seniority, status and pay to his old job. *Gammal I supra* at 656, ft. 1. The District Court claimed that it could not consider the *de facto* reduction-in-rank issue because the Court of Appeals' decision in *Gammal I* made the remaining administrative appeals moot.

B. The Court of Appeals' Decision That the Holding in *Bush* v. *Lucas*, ___ U.S. ___, 103 S.Ct. 2404 (1983) Eliminated Petitioner's Count II Claims Is Erroneous.

The Court of Appeals found that "[t]here are no tenable grounds for avoiding the impact of *Bush* on appellant's Count II claims. They are not viable" (A. 5). Mr. Gammal's case differs from the *Bush* case in several important aspects. Mr. Bush was successful in his civil service appeals and was restored to his position with full back pay. Mr. Gammal's

situation, being much more complex and having extended over a period of years, has resulted in several civil service appeals each addressing only an isolated segment of the whole situation. As a result, Mr. Gammal has not had the benefit of a single forum to present the totality of issues between himself and the agency. This problem was further exacerbated by the impact of the Civil Service Reform Act of 1978 (Pub. L. 95-454) because Mr. Gammal was forced to appeal the various administrative rulings to two different courts. In the *Bush* case, this Court envisioned a civil service appeals process which afforded the same protection as does the court system, including "trial type hearing(s) at which the employee could present witnesses and secure the attendance of agency officials..." 103 S.Ct. at 2416. Mr. Gammal has never been given a trial-type hearing on the *de facto* reduction-in-rank issue. The *Bush* Court found that Congress intended that the Civil Service remedies, "would put the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place". This Court went on to state that,

> "[g]iven the history of the development of Civil Service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue." *Id.* at 2416.

Unlike Mr. Bush, Mr. Gammal has never been given a hearing in any forum regarding the *de facto* reduction in rank issue. As applied to Mr. Gammal, the "inadequacy of this remedy is obvious". *Carroll* v. *United states*, 707 F.2d 836, 838 (5th Cir. 1983).

Secondly, Mr. Bush's case dealt only with First Amendment violations. Mr. Gammal has alleged violations of his due process rights under the Fifth Amendment as well. These due process allegations concern the failure of the defendants to follow proper procedure, including the granting of a hearing, in effectuating a reduction in Mr. Gammal's rank.

Thirdly, it was found in the *Bush* case, that some of Mr. Bush's disclosures were misleading and were in fact motivated by selfish rather than altruistic reasons. *Id.* at 2407. The respondents have never alleged, nor could they, that Mr. Gammal's motives for his disclosures, were other than to insure that H.U.D. carried out its proper mission, without corruption. The whole focus of Mr. Gammal's activities was to make sure that the taxpayer got his moneysworth in the awarding of federally funded contracts. Subsequent events, and the numerous indictments against H.U.D. and local housing authority officials bear witness to Mr. Gammal's credibility.[1] If there is no redress in the civil service system or in the courts for civil servants such as Mr. Gammal, will public employees speak up when they observe unlawful activity in their agencies?

Conclusion

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Attorney for the Petitioner

[1] While the truth of Mr. Gammal's allegations is not an issue here, it should be noted that one of Mr. Gammal's former co-workers has pleaded guilty to bribery charges connected with his official duties; that the former Executive Director of the Somerville Housing Authority pleaded guilty to misappropriation of housing authority funds; that the former Assistant Director of the Fall River Housing Authority pleaded guilty to extortion charges; and that the Boston Housing Authority has been placed in court-supervised receivership.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 83-1084

ABRAHAM A. GAMMAL,
PLAINTIFF, APPELLANT,

v.

JAMES HAMROCK, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT
Entered: November 30, 1983

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:
FRANCIS P. SCIGLIANO
Clerk.

[cc: Ms. Schmidt and Mr. Child]

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 83-1084

ABRAHAM A. GAMMAL,
PLAINTIFF, APPELLANT,

v.

JAMES HAMROCK, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT J. DEGIACOMO,* *U.S. Magistrate*]

Before
CAMPBELL, *Chief Judge*,
ROSENN,** *Senior Circuit Judge*,
and BOWNES, *Circuit Judge*.

Joan C. Schmidt, with whom *Law Offices of F. Lee Bailey* was on brief, for appellant.

Ralph A. Child, Assistant United States Attorney, with whom *William F. Weld*, United States Attorney, and *Patricia Cook Profit*, Attorney-Advisor, United States Department of Housing and Urban Development, were on brief, for appellees.

November 30, 1983

Per Curiam. This is an appeal by plaintiff-appellant, Abraham A. Gammal, from summary judgment in favor of defendants-appellees, James Hamrock, Kenneth Salk, and

* Of the District of Massachusetts, sitting by designation.

** Of the Third Circuit, sitting by designation.

Edward T. Martin.[1] The defendants had supervisory positions in the United States Department of Housing and Urban Development (HUD) when plaintiff was employed there. Plaintiff's employment status when he worked at HUD is the subject matter of this suit.

This is a two-count action. In Count I Gammal alleges a wrongful discharge by defendants and seeks reinstatement, back pay, restoration of benefits and expungement of adverse material from his personnel records. Count II alleges violation of Gamma's first and fifth amendment rights and a civil rights conspiracy claim pursuant to 42 U.S.C. § 1985(1). The magistrate[2] granted summary judgment on Count I on the grounds that this claim was moot. Summary judgment was granted on Count II on two grounds: that there was no indication that any evidence would be forthcoming to support the conspiracy claim, and that *Bush* v. *Lucas*, 51 U.S.L.W. 4752 (June 13, 1983), foreclosed the constitutional claims. We affirm.

Count I

This is the second time this matter has been before us. The pertinent facts are set forth fully in *Gammal* v. *Merit Systems Protection Board*, 671 F.2d 654 (1st Cir. 1982). We, therefore, state only the facts necessary to understand the case now before us. The complaint initiating this action was filed in August of 1979 when Gammal was working in the Boston office of HUD. The gist of his claim was that he received *de facto* reductions in rank in 1977 because he openly criticized the way HUD's Boston office was being run, and had notified the President of the United States of waste and mismanage-

[1] Plaintiff also sued Ruth D. Prokop, Chairperson of the United States Merit System Protection Board, and Ersa Poston, a member of the Board. It is not clear from the record whether Prokop and Poston are still defendants. The magistrate's opinion refers only to Hamrock, Salk, and Martin as defendants. In any event, our findings and rulings apply to all defendants at the time the appeal was taken.

[2] The case was heard by the magistrate pursuant to 28 U.S.C. § 636(c).

ment in its operation. While the case was proceeding, Gammal was discharged by HUD for being absent without leave. He appealed the discharge to the Merit Systems Protection Board. After the Board upheld the discharge, he appealed to this court. Proceedings in the case were stayed by the district court pending our decision. We affirmed the decision of the Board upholding Gammal's discharge by HUD. *Id.*

A case becomes moot when there are no longer any live issues or the parties lack a legally cognizable interest in the result because there is no reasonable expectation that the alleged violation will recur and interim events have completely and irrevocably eradicated the effects of the alleged violation. *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979); *Loeterman* v. *Town of Brookline*, 709 F.2d 116 (1st Cir. 1983).

The Count I claims became moot when we upheld plaintiff's discharge by HUD. Because of the discharge, no relief on the *de facto* reduction-in-rank claim is now possible. Our holding in *Gammal* v. *Merit Systems Protection Board* clearly presaged this result:

> Appellant has pursued separate routes for review for two different events that have occurred in the course of his employment. The fact that a decision about the second, later alleged wrong precludes some relief attainable to remedy the first alleged wrong does not mean that a correct decision on the second wrong should be deferred. In fact, in this instance the district court has stayed its proceedings pending our decision, an action that seems entirely reasonable under the circumstances.

671 F.2d at 657.

Appellant's argument that he has become an innocent victim of the Civil Service Reform Act of 1978 is not really a challenge to mootness. It is a plea that his claims be reconsidered. We decline to do so.

Count II

In *Bush* v. *Lucas*, 51 U.S.L.W. 4752, which is basically similar to the case before us, the Court held:

> Petitioner asks us to authorize a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors. Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy.

Id. at 4753. There are no tenable grounds for avoiding the impact of *Bush* on appellant's Count II claims. They are not viable.

Affirmed. Costs to appellees.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 79-1530-T
MAGISTRATE NO. 724-82-D

ABRAHAM A. GAMMAL

v.

JAMES HAMROCK, ET AL.

MEMORANDUM AND ORDER
January 10, 1983

DEGIACOMO, U.S.M.

In this suit, the plaintiff, a former employee of the United States Department of Housing and Urban Development at the Boston Area Office, seeks in Count I reinstatement to his former position, alleging a wrongful discharge, and in Count II seeks compensatory and punitive damages, alleging claims under the first and fifth amendments, and a civil rights conspiracy under 42 U.S.C. §1985(1). The defendants have moved for summary judgment on both counts on the grounds that (1) his claim for reinstatement was decided adversely to him when a decision of the Merit Systems Protection Board removing him for his failure to report to duty after reinstatement was affirmed by the Court of Appeals, *Gammal* v. *Merit Systems Protection Board and Department of Housing and Urban Development*. 671 F.2d 654 (1st Cir. 1982); and (2) personal disputes involving federal civil service employees do not fall within the rule of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The defendants argue that there is simply no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. I agree, and, for the reasons which follow, this motion is granted.

I. The Facts

The plaintiff began his employment in 1970 as a Maintenance Engineer, GS-13, in the Housing Programs Management Branch in the Housing Management Division of the Boston Area Office. He remained an employee until September 5, 1980.

The defendants are three HUD officials who are sued individually and in their official capacities. They are James Hamrock, Chief of the Assisted Housing Management Branch of the Boston Area Office, and the plaintiff's immediate superior since March, 1975; Kenneth Salk, Deputy Director for Management in the Housing Division of the Area Office; and Edward Pollack, Deputy Area Manager of the Area Office from September, 1970 until the present, except that between June 30, 1976 and August 9, 1977 he was temporarily assigned to the Boston Regional Office. Edward T. Martin, formerly Regional Administrator of HUD, Region I, is sued in his official capacity only, and two members of the Merit Systems Protection Board are also sued in their official capacities.

The duties of a maintenance engineer as set forth in the position description in effect in November of 1971 can be summarized as follows:

> The maintenance engineer provides advice and assistance to program participants in connection with the technical and engineering aspects of maintenance, rehabilitation, and modernization of housing. He evaluates local maintenance programs, results, accomplishments and expenditures to assist in providing effective and economical maintenance programs. As directed, he makes physical inspections of public housing under HUD programs and reports findings to appropriate program officers and on request provides technical advice and assistance in taking necessary follow-up action. He makes a continuous review of utilities costs and conditions in public housing programs to determine if changes

> are warranted for reasons of economy or efficiency. (Salk Affidavit, Par. 4, Plaintiff's Affidavit in Opposition to Defendant's Motion for Summary Judgment, Ex. B, Pg. 3.)

The position was under the supervision of the Chief of the Housing Programs Management Branch. There were four maintenance engineers, including the plaintiff. The job description was the same for each. The other maintenance engineers were not of the same grade. The plaintiff considered that as senior maintenance engineer he was a supervisor, and acted as such. As a result, there was a certain amount of discord and friction between the plaintiff and the other maintenance engineers. On July 18, 1974, the defendant Salk, as Director of Housing Management in the Boston Area Office, notified the plaintiff that he was to immediately cease all supervisory functions and that "at no time was any supervisory function delegated to you, nor is there any mention in your job description of any supervisory responsibility over the maintenance engineers or any other staff members. You are not to delegate work assignments to the maintenance engineers, or exercise control over their work in any way." A copy of the job description was attached. (Plaintiff's affidavit in Opposition to Motion for Summary Judgment, Ex. B.) Shortly after the defendant Hamrock became Chief, Assistant Housing Management Branch, in March, 1975, he was requested to sign a position description for the plaintiff identifying him as a "Senior Maintenance Engineer." He was concerned with the description and returned it unsigned to the Deputy Division Director who signed it on August 5, 1975. (Hamrock Affidavit, Par. 5; Ex. 7, Salk Deposition.) The duties of the Senior Maintenance Engineer as set forth in the job description provided *inter alia* that he:

> Supervises the activity of maintenance engineering, comprised of maintenance engineers, utilities specialists, and other personnel that may be assigned thereto. . . .

> Determines the manner in which the group's responsibilities are to be carried out by establishing uniform working procedures, assigning responsibilities in such manner as to optimize the relationship between individual responsibilities and capabilities and coordinating individual efforts.
>
> He is responsible for overall planning, scheduling, monitoring and reviewing the group's work. . . .

The job description concluded with the statement that the position was under the supervision of the Chief of Housing Programs Management Branch.

On September 30, 1975, the defendant Hamrock on inquiry from the plaintiff as to the procedure to be used in signing or concurring in correspondence informed the plaintiff:

> This is to confirm that as Senior Maintenance Engineer, in accordance with your position description, you are to directly supervise the Maintenance Engineers and the Utility Specialist in the Branch, including assignment and review of work and concurrence of relative correspondence.

(Plaintiff's Affidavit in Opposition to Motion for Summary Judgment, Ex. A.) The defendant Hamrock on inquiry from the other maintenance personnel as to the meaning of the plaintiff's position description assured them that the plaintiff had not become their supervisor and that their own position descriptions contained the statement that their positions were under the supervision of the Chief of the Housing Programs Management Branch.

The problems between the plaintiff and his colleagues over his supervisory authority or the lack of it continued to escalate. Prior to this time (in September, 1974), the defendant Salk proposed a reorganization of the Branch into geographically based teams of specialists to serve HUD programs. He proposed four housing teams which would be responsible for

HUD assisted housing in an assigned geographic area. The plaintiff was designated as "Team Leader." He objected strenuously and threatened to commit suicide, sending a memo to that effect. The plan was not put into effect. (Plaintiff's Deposition, Volume 1, pgs. 75, 76.) The effect of the suicide threat on the proposed reorganization program is questionable. In any event, the then acting Area Director rejected the plan with leave to submit another plan along functional rather than geographical lines. (Plaintiff's Affidavit in Opposition to Motion for Summary Judgment, Ex. C.) See also Salk Affidavit, Par. 8; Pollack Affidavit, Pars. 3 and 4.

A variation of the team concept was approved and established in the fall of 1975. The plaintiff was a "Team Leader." The personnel problems continued. The plaintiff took strong issue with various HUD practices and programs. This eventually culminated in his sending a mailgram to President Carter in April, 1977 containing charges of waste and mismanagement. An investigation resulted. In June, 1977 the division director instructed the defendant Hamrock to assume direct supervision of the utility specialist. The plaintiff objected. The division director then instructed the defendant Hamrock to revise the plaintiff's position description to reflect the responsibilities of a team leader and to assign a specific public housing authority workload to him. The plaintiff refused to sign the position description. The team concept reorganization plan was formally implemented on August 16, 1977. The plaintiff refused to participate and refused all assignments. A determination was made by the defendant Hamrock that the plaintiff was not eligible for a within-grade salary increase, and on September 28, 1977 he was suspended for 30 days. Through a series of administrative appeals the suspension was reduced to 5 days. The withholding of the within-grade pay increase was ultimately upheld by the Merit Systems Protection Board on June 18, 1980.

During this period the plaintiff challenged the reorganization as a *de facto* reduction in rank and part of a pattern of continued harassment. He received an adverse finding from the Civil Service Commission, and the Merit Systems Protection Board refused to reopen the matter. (Exs. 50 and 51, Deposition of Kenneth A. Salk.)

The plaintiff initiated administrative grievances against the defendants Salk and Hamrock in December, 1977, alleging harassment. In controversy were the method of review of a contract to determine the reasonableness of an architect's maximum fee, and the claim of a denial of secretarial services. As to the former, the plaintiff reviewed the matter himself without the engineer he wished to participate or the engineer whom he was directed to utilize and with whom the contract had originated. The fee was reduced. As to the latter, the defendant Hamrock had denied a request for secretarial assistance on one occasion. Thereafter, he was no longer required to request secretarial assistance from the defendant Hamrock. The grievances were heard by the defendant Pollack over the plaintiff's objections. They were not heard on the merits, defendant Pollack having determined that the matter was identical to another grievance already submitted on which a decision was awaited. The matter was dismissed by the defendant Pollack and on appeal said dismissal was found to be unwarranted and the plaintiff was offered the opportunity to resubmit the grievance. He declined to do so. (Plaintiff's Deposition, Volume 1, pgs. 68 and 69; Ex. 56, Deposition of Kenneth A. Salk.)

In November of 1977, the plaintiff was accused of having copied and transmitted a number of internal HUD memoranda to the directors of various public housing authorities across the state. The matter was referred to the HUD Inspector General. As a result of the investigation the defendant Pollack ordered the plaintiff to undergo a psychiatric examination for fitness for duty. He was found fit for duty. No charges were pressed on the copying of records issue. (Exs. 57 and 58, Deposition of Kenneth A. Salk.)

The reorganization which the plaintiff had challenged contained a reduction in force procedure. It was effective for fiscal year 1978. The plaintiff was informed that this could have an effect on his position and was asked whether he would like to be considered for a position in the Boston Area at a lower grade, or a position outside this area. He failed to respond. He was offered what was considered to be a comparable position at the same grade, GS-13, at the Federal Insurance Administration in Washington, D.C. He declined on the basis of location, and that it was not a supervisory position. He was then scheduled for separation on September 9, 1978. (Exs. 59, 60, 61 to Deposition of Kenneth A. Salk; Deposition of Plaintiff, Volume 1, pgs. 85-90.) The date was extended to September 30, 1978. (Ex. 62, Deposition of Kenneth A. Salk.) The plaintiff appealed to the Civil Service Commission. The Commission sustained the appeal, finding:

> The agency offered no evidence to explain why Mr. Gammal's position was selected to be abolished rather than any of those which would serve to rebut Mr. Gammal's claim that his position was selected to be abolished by way of reprisal or retaliation.

(Ex. 63, Deposition of Kenneth A. Salk.) The agency appealed, and HUD offered the plaintiff a temporary position at a GS-13 as a maintenance engineer within the Boston Area Office. The plaintiff did not accept the position and never reported for duty. He contended then as he does now that he was entitled to occupy the position of supervisor to the maintenance engineers notwithstanding that the position no longer existed. (Deposition of Plaintiff, Volume 1, pgs. 99, 100; Volume 2, pgs. 43, 44; Ex. 65 and 66, Deposition of Kenneth A. Salk.)

The Merit Systems Protection Board denied HUD's request for reconsideration, following which the plaintiff was offered a permanent position as a Maintenance Engineer, GS-13, in the Boston Area Office, reporting directly to the Area Direc-

tor. He refused the position, claiming that it did not comply with the requirements of the Civil Service Commission. (Plaintiff's Deposition, Volume 1, pgs. 106, 107, 113; Ex. 67, Deposition of Kenneth A. Salk.) Despite an opinion by the Merit Systems Protection Board to the effect that the position offered the plaintiff met the requirements of the decision, the plaintiff continued to refuse to accept the position and consistently refused to report for work. (Plaintiff's Deposition, Volume 1, pgs. 114, 115; Volume 2, pgs. 41, 42; Exs. 67, 69, Deposition of Kenneth A. Salk.) His employment was terminated on September 5, 1980. The plaintiff filed a petition for review of the final decision of the Merit Systems Protection Board with the Court of Appeals for this circuit. That matter was decided on February 24, 1982. The court affirmed the decision of the Merit Systems Protection Board upholding the plaintiff's removal. *Gammal v. Merit Systems Protection Board and Department of Housing and Urban Development*, 617 F.2d 654 (1st Cir. 1982).

II. The Standard for Summary Judgment

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The court must "look at the record...in the light most favorable to...the party opposing the motion.... Similarly the court must indulge all inferences favorable to the party opposing the motion. These rules must be applied with recognition of the fact that it is the function of summary judgment, in the time-hallowed phrase, 'to pierce formal allegations of facts in the pleadings...', and to determine whether further exploration of the facts is necessary.

"The language of Rule 56(c) sets forth a bifurcated standard which the party opposing summary judgment must meet to establish the motion. He must establish the existence of an issue of fact which is both 'genuine' and 'material'. A material issue is one which affects the outcome of the litigation. To be considered 'genuine' for Rule 56 purposes a material issue must be established by 'sufficient evidence supporting the claimed factual dispute. . . to require a jury or judge to resolve the parties' differing versions of the truth at trial.' The evidence manifesting the dispute must be 'substantial', going beyond the allegations of the complaint." *Hahn* v. *Sargent*, 523 F.2d 461 (1st Cir. 1975) (citations omitted). Although "the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture." *Hahn, supra*, at 467 quoting *Manganaro* v. *Delaval Separator Co.*, 309 F.2d 389, 393 (1st Cir. 1972). See also *White, et al.* v. *The Hearst Corporation, et al.*, 669 F.2d 14 (1st Cir. 1982).

In their final memorandum, in addition to arguing the appropriateness of summary judgment under the above standard, the defendants urged dismissal of Count 1 of the complaint as being moot, and Count 2 for failure to state a cause of action.

III. The Effect of *Gammal* v. *Merit Systems Protection Board and Department of Housing and Urban Development.*

Count 1 of this complaint is basically an appeal under 5 U.S.C. §7501, *et seq.*, and 5 U.S.C. §701, *et seq.* from two decisions of the Merit Systems Protection Board refusing to reopen complaints concerning the plaintiff's claimed *de facto* reductions in 1977. He also seeks back pay and benefits. (Prayers 1, 3 and 4 under Count 1 of the complaint.) In addition he seeks, under Count 1, the expungement of adverse entries in his personnel record concerning these controversies, costs and attorney's fees. (Prayers 2 and 5 of the complaint.)

I am satisfied that the relief prayed for under Count 1 has been mooted by the decision in *Gammal*. The argument before the court was that the Board had abused its discretion by accepting the Appeals Officer's determination on January 23, 1980 that he had been restored to his position in compliance with the reinstatement order, in that he was never in fact reinstated to a position comparable to that previously held and therefore could not have been AWOL. In addition he argued that the Board should not have concluded that the new job was comparable while there was pending in the district court the issue of whether he suffered any *de facto* changes in his job responsibilities before he was wrongly discharged. He argued that the Board should have stayed its proceedings pending the outcome of the case in the district court, admitting that a decision by the Board mooted some of his claims for relief. I read the response to be clear.

> ...Although the Board's decision that appellant was properly removed from service will make inappropriate some relief, *such as appellant's request for reinstatement to his duties before the alleged de facto changes in his responsibilities*, this provides no reason to stay the Board's actions.... (emphasis supplied)

Gammal, supra. It is correct as argued by the plaintiff that the court's review of the Board's decision was limited to determining whether or not the Board's action was an abuse of discretion, unsupported by substantial evidence or subject to procedural error. It does not follow however that in upholding the decision of the Board the plaintiff is free to go behind the decision and litigate the factual basis for the Board's findings. In any event, assuming for argument that the issues of what the plaintiff's position was, the duties he actually performed and whether his position description accurately reflected the work he did are viable, on this record summary judgment is appropriate. These matters are all keyed to the allegation of a *de facto* reduction in rank or change in job description, and were

rejected twice by the Civil Service Commission. These rulings were upheld by the Merit Systems Protection Board. Insofar as they are at issue before this court, review is limited to a determination on the record as to whether or not the agency's actions were arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law. When the affidavits and pleadings are weighed they simply do not show any genuine issue as to any material fact warranting a trial. There has been no showing that the claimed reduction in rank was due to the plaintiff's exercise of his first amendment rights. What we have here is a continuous tracking of the allegations in the complaint. More is required.

IV. The Conspiracy Claim — Count II

It is the position of the plaintiff that all his problems, including his final dismissal, were brought about by a conspiracy of the defendants in retaliation for his public criticisms of HUD. The plaintiff seems to reason throughout this entire record that because the several defendants in their various and different capacities had problems with him arising out of a variety of personnel matters it follows that each of them are conspirators. There has been no indication that any evidence could be produced to substantiate this belief. That the plaintiff's reforming zeal may have been rejected, does not support in any way the claimed conspiracy. *Manego* v. *Cape Cod Five Cent Savings Bank*, No. 82-1414, slip op. (1st Cir. Oct. 28, 1982).

V. The *Bivens* Question — Count II

The defendants argue that there is no basis in this case for the doctrine of *Bivens*, *supra*. They rest on *Bush* v. *Lucas*, 647 F.2d 573 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3908 (June 28, 1982), holding that the "unique relationship between the federal government and its civil service employees is a special consideration which counsel's hesitation in inferring a

Bivens remedy." This record is certainly one that counsel's hesitation; however, assuming there is a right to a *Bivens* action, I am satisified that summary judgment is applicable, in that these defendants have met the test in *Harlow, et al.* v. *Fitzgerald*, 50 U.S.L.W. 4815 (U.S. 80-945, June 24, 1982). There the court held that "... government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (citations omitted) I am satisfied that these defendants have a qualified immunity and that there is no genuine material factual issue raised that any of them *knew or reasonably should have known* that any of the actions complained of would violate the constitutional rights of the plaintiff or that any action was taken *with malicious intention* to cause a deprivation of constitutional rights or other injury. *Harlow, supra*, citing *Wood* v. *Strickland*, 420 U.S. 308, 321-322 (1975) (emphasis supplied).

For the foregoing reasons, the defendants' motion for summary judgment is therefore ORDERED allowed.

(s) Robert F. deGiacomo
United States Magistrate

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 81-1129

ABRAHAM GAMMAL,
PETITIONER,

v.

MERIT SYSTEMS PROTECTION BOARD
and
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
RESPONDENTS.

ON PETITION FOR REVIEW OF FINAL DECISION
OF THE MERIT SYSTEMS PROTECTION BOARD

Before
COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
WYZANSKI, *Senior District Judge*.*

Joan C. Schmidt, with whom *F. Lee Bailey* was on brief, for petitioner.

Paul E. Troy, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for respondents.

February 24, 1982

COFFIN, *Chief Judge*. Appellant, Abraham Gammal, seeks review of the Merit Systems Protection Board's (the Board's) decision to affirm the removal of appellant from his position as

* Of the District of Massachusetts, sitting by designation.

a GS-13 Maintenance Engineer with the U.S. Department of Housing and Urban Development (HUD) in Boston. Appellant's removal was the culmination of a long series of disputes between appellant and HUD that warrant brief review to the extent that they form the basis for appellant's arguments on appeal.

After serving for seven years as a Maintenance Engineer with HUD, appellant sent a mailgram to President Carter in April, 1977, informing him of waste and mismanagement in certain HUD programs. Although the mailgram promoted the sought-after internal investigation and subsequent housecleaning, appellant subsequently claimed that it also caused HUD to deny appellant salary increases to which he was entitled, to make *de facto* changes in his job description by relieving him of supervisory responsibilities, and to remove him from employment in September, 1978, ostensibly because of a reduction in force. In separate actions the predecessor of the Board, functioning under the United States Civil Service Commission, found the denial of salary increases and the removal to be retaliatory and ordered respectively the pay increases due and reinstatement in the same position or one of like "seniority, status and pay". Because appellant was awarded no relief from the alleged de facto changes in job description, he filed an action in federal district court seeking relief.

Appellant refused to accept the new GS-13 position offered by HUD to comply with the reinstatement order. Reorganization of HUD had resulted in the abolition of appellant's old position, and he contended primarily that the new position was not of like "seniority, status and pay" and therefore not in compliance with the reinstatement order. Despite a finding by the Board's Appeals Officer on January 23, 1980, that the new offer was in compliance, appellant refused to appear for duty. HUD informed appellant that he was absent without leave (AWOL), and, after more than seven months, during which it delayed the imposition of sanctions and urged compliance

several times, completed the removal proceedings from which appellant appealed to the Board and now to this court.

The Board upheld appellant's removal because it found that the Appeals Officer had previously determined that the offer of the new job was in compliance with the reinstatement order and that the inability of HUD to reassign appellant to his former job was not a continuation of the previous reprisals against him. In addition, the Board noted that appellant's fears that he had been intentionally assigned to a position he was not competent to fulfill in order that HUD might then have reason to dismiss him did not allow him to refuse to report for duty. If he were eventually removed for inefficiency, he could allege at that time that he was not qualified to perform the assigned duties. Based on these findings, the Board concluded that appellant did not have any justification for not having reported to work and that his removal was for the permissible cause of promoting the efficiency of the federal service. 5 U.S.C. § 7513.

In sum, in the course of these events, appellant feels that he was inflicted with three wrongs: the *de facto* change in job description, his removal due to the ostensible reduction in force, and his removal after reinstatement for failure to report to duty. We are primarily concerned with the latter removal decision, and with the other actions only to the extent that they affect this decision. Our jurisdiction is limited to the appeal from the Board's final decision affirming appellant's removal for being AWOL, and it is limited to a review to determine whether the Board's action was an abuse of discretion, unsupported by substantial evidence, or subject to procedural error. 5 U.S.C. § 7703(a)(1),(c).

Appellant contends first that the Board abused its discretion by accepting the Appeals Officer's determination on January 23, 1980, that appellant had been restored to his position in

compliance with the reinstatement order.[1] He argues that because he was never in fact reinstated to a position comparable to that previously held, he cannot have been AWOL. We do not find, however, that the Board abused its discretion by relying on the Appeals Officer's decision. When an employee believes that an agency has not complied with a final decision issued by the Board, he may file a petition for enforcement to be reviewed by the Chief Appeals Officer. 5 C.F.R. §§ 1201.181, 1201.182. Appellant had the opportunity to do this when he concluded that the position offered to him by HUD was not in compliance with the reinstatement order. Instead, however, he chose not to appear for work, and it was the agency that eventually sought an opinion on the comparability of the new job. Although appellant might have had a slightly greater opportunity to affect the finding on comparability had he filed a petition with its accompanying statement for reasons why he felt HUD had not complied, he did submit a letter indicating that he thought HUD's efforts lacking, and he could have expanded upon his reasons in that letter. The dispute was resolved by the director of the Office of Appeals, the same person who would have ruled on a petition for enforcement submitted by appellant. The Board cannot force appellant to take the proper procedures available upon his own initiative. In the absence of such initiative, it was justified in accepting a determination on the question of comparability that had been reached by procedures similar to those available to appellant. Appellant suffered no injustice requiring us to find that the Board abused its discretion by accepting the Appeals Officer's decision.[2]

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[1] Without passing on the merits of the holding that appellant's putative new position was of like seniority, status, and pay to the old one, we observe few differences in the two or three first paragraphs of each job description and practically verbatim identity in the ten remaining paragraphs.

[2] Although we note that we do not think that protest through passive resistance of the type in which appellant engaged promotes an orderly system for the resolution of employment disputes, we need not decide whether an employee is ever justified in asserting the lack of compliance as a defense for

Nor was it an abuse of discretion for the Board to find that appellant's alleged inadequacy for the job was a factor to be considered not at the present, but if and when appellant were ever dismissed for inadequate performance. When an agency wishes to remove an employee to "promote the efficiency" of the agency, as it would if the employee were incapable of performing the assigned duties, the employee is entitled to respond to the proposed removal by submitting reasons why he should not be removed. *See* 5 U.S.C. § 7513. We cannot say that it was an abuse of discretion for the Board to find that appellant should have asserted a defense of inadequacy during a removal proceeding after he has started working rather than during a removal proceeding instigated because he refused to work for fear of inadequacy. *Cf. Rotolo* v. *Merit Systems Protection Board*, 636 F.2d 6, 8 (1st Cir. 1980); *Hurley* v. *United States*, 575 F.2d 792, 793 (10th Cir. 1978). Although the Board places the burden on the employee to try to perform, to allow the employee to protest without first trying would severely impair the agency's ability to plan for and to proceed with its normal functions. While we can understand that appellant's confidence in the intentions of HUD and its willingness to comply in good faith with the reinstatement order may have been shattered by his past experiences, his suspicion of wrongdoing in this instance cannot justify a finding that the Board must reach a conclusion other than the one it has chosen.[3]

Appellant also, despite his earlier demand for an expeditious decision by the Board on his appeal, contends that the Board

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failure to report to duty when the opportunity exists to seek a determination on whether the agency has complied. We need only find here that the Board did not abuse its discretion in finding that defense inadequate in this instance.

[3] We note also the possibility that appellant might have been able to assert his claim that he had been assigned to the new position in bad faith by grieving through the procedures established by agreement between the union and the agency. Assuming that appellant was an employee covered by the agreement, this would have offered him an avenue for seeking relief prior to the institution of removal proceedings on the grounds of inadequacy.

should have stayed its proceedings pending the outcome of the case filed in district court. Appellant reasons first that the Board should not have concluded that the new job was comparable while the action is pending in district court on the issue whether appellant suffered any *de facto* changes in his job responsibilities before he was wrongly discharged. Any alleged changes in the actual duties performed by appellant before his dismissal and reinstatement, however, would have affected the Appeals Officer's determination about comparability that officer relied upon a comparison of the formal job descriptions rather than a detailing of the actual functions performed in reaching his conclusion that HUD had complied with the reinstatement order.

Appellant's second argument for a stay—that a decision by the Board moots some of appellant's claims for relief in district court—is equally unpersuasive. Although the Board's decision that appellant was properly removed from service will make appropriate some relief, such as appellant's request for reinstatement to his duties before the alleged *de facto* changes in his responsibilities, this provides no reason to stay the Board's actions. Appellant has pursued separate routes for review for two different events that have occurred in the course of his employment. The fact that a decision about the second, later alleged wrong precludes some relief attainable to remedy the first alleged wrong does not mean that a correct decision on the second wrong should be deferred. In fact, in this instance the district court has stayed its proceedings pending our decision, an action that seems entirely reasonable under the circumstances.

The decision of the Merit Systems Protection Board upholding appellant's removal is affirmed.

APPENDIX D

CONSTITUTIONAL PROVISIONS

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 83-1420

In the Supreme Court of the United States

OCTOBER TERM, 1983

ABRAHAM A. GAMMAL, PETITIONER

v.

JAMES HAMROCK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, whose discharge from his position with the Department of Housing and Urban Development (HUD) was upheld in previous litigation, seeks damages from his supervisors in their individual capacities for various alleged constitutional violations and relief from the government for an alleged "de facto reduction in rank" that preceded his dismissal.

1. Petitioner was a GS-13 maintenance engineer in the Boston Area Office of HUD. From 1974 until 1978, he engaged in several protracted controversies with his superiors concerning whether he had supervisory authority over other maintenance engineers and other issues involving the organization of the office. During this period, various disciplinary sanctions were imposed on petitioner, including a brief suspension and the withholding of a regularly scheduled pay increase. These sanctions were upheld on administrative appeals. Pet. App. B2-B6.

In 1978, as a result of a reorganization, petitioner was advised that his position would be abolished. He was offered a position in Washington, D.C. When he declined to accept that position, he was scheduled for dismissal. The Civil Service Commission (CSC) upheld petitioner's administrative appeal from this action, however, ruling that his removal was in retaliation for a complaint he had made about waste and mismanagement in the agency. The CSC ordered that petitioner be reinstated. Pet. App. B7, C2.[1]

Petitioner was then offered a different GS-13 position in Boston. When petitioner refused to accept the new position and did not report for duty, HUD obtained an administrative determination that the offer satisfied the CSC remedial order. HUD then informed petitioner that if he did not report he would be considered absent without leave and could be terminated. Pet. App. C2-C3. "[A]fter more than seven months, during which [HUD] delayed the imposition of sanctions and urged compliance several times, [HUD] completed the removal proceedings" (*ibid.*). Petitioner challenged this removal decision, but the Merit Systems Protection Board (MSPB) upheld the agency's action (see note 1), and the court of appeals affirmed the MSPB's decision (Pet. App. C1-C6; *Gammal* v. *MSPB*, 671 F.2d 654 (1st Cir. 1982)). Petitioner did not seek further review.

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[1]Before Congress enacted the Civil Service Reform Act of 1978, adverse personnel actions could generally be appealed to the Civil Service Commission's Federal Employee Appeals Authority. An employee could seek review of a decision by the Authority by filing suit in United States district court or in the Court of Claims. See *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 20. Under the Civil Service Reform Act, adverse actions in disciplinary cases are appealable to the Merit Systems Protection Board (MSPB); MSPB decisions may be reviewed by filing a petition for review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7701 and 7703. Before 1982, a petition for review of an MSPB decision could be filed in any appropriate court of appeals. 5 U.S.C. (1976 ed. Supp. V) 7703.

2. In the meantime, petitioner had filed this action in the United States District Court for the District of Massachusetts. Count I of the complaint sought correction of records and back pay for an alleged "de facto reduction in rank" that occurred before petitioner's removal. The essence of this claim was that petitioner was denied supervisory duties that he considered to be part of his job. See Complaint para. 24. Petitioner had presented his claim of a "de facto reduction in rank" to the CSC and had been denied relief. Pet. App. A3, B9; see Pet. 4.[2] Count II of the complaint sought money damages for alleged constitutional violations from respondents, who were petitioner's civil service superiors, in their personal capacities. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

The district court stayed proceedings on this complaint pending the disposition of petitioner's efforts to obtain review of the MSPB decision (see Pet. App. C6). After the court of appeals ruled against petitioner in that proceeding, a magistrate dismissed the complaint (*id.* at B1-B12).[3] The magistrate ruled that Count I had been rendered moot by the court of appeals' decision upholding petitioner's removal for being absent without leave. The magistrate concluded in addition that summary judgment was appropriate because petitioner had failed to offer sufficient evidence to draw into question the administrative decisions rejecting his claims. *Id.* at B10-B11. The magistrate granted summary judgment against petitioner on Count II as well (*id.* at

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[2]Petitioner also originally alleged a conspiracy to deprive him of his constitutional rights, in violation of 42 U.S.C. (Supp. V) 1985(1). The district court dismissed that claim because it found "no indication that any evidence could be produced to substantiate" it (Pet. App. B11), and petitioner has not pursued it.

[3]The case was heard by a magistrate pursuant to 28 U.S.C. 636(c).

B11-B12), holding that respondents were immune from personal damages liability under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

The court of appeals affirmed (Pet. App. A2-A5; 725 F.2d 664). It ruled that Count I was moot and that Count II was barred by *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), which held that a federal employee may not bring a *Bivens* action against a superior on the basis of claims that are addressed by the civil service remedies provided by Congress.

3. The decisions of the courts below are plainly correct. The Count I claim challenging a "de facto reduction in rank" became moot when it was finally determined that HUD had remedied petitioner's dismissal by offering him a different position and was not required to reestablish petitioner's previous position. Petitioner fails to identify any relief that can now be given that would remedy the alleged "de facto reduction in rank," even if his claim in Count I were sustained. In particular, since the position to which this claim relates has been abolished, and petitioner has been lawfully discharged from government service, the responsibilities of which he was allegedly divested cannot be restored to him.

Although petitioner asserts (*e.g.*, Pet. 4) that he seeks back pay, he does not explain why back pay is an appropriate remedy for a "de facto reduction in rank" that apparently did not affect petitioner's compensation. In any event, petitioner identifies no statute that would waive sovereign immunity and authorize the government to pay money damages for a wrongful "de facto reduction in rank." Petitioner also seeks correction of records, but he suggests no reason to believe that the allegedly wrongful action is reflected in any records. Indeed, petitioner's point in denominating it a "de facto" reduction in rank appears to be precisely that it is not reflected in any official records (see,

e.g., Pet. 6-7), and the complaint (paras. 24, 26) repeatedly states that the "de facto reduction in rank" was *not* effected through any formal or official personnel action.[4]

Count II is plainly barred by *Bush* v. *Lucas*. Petitioner had an opportunity to invoke, and did invoke, the elaborate remedial mechanism provided by Congress for federal employees. Indeed, that remedial scheme provided him with complete relief for his removal, but he failed to take advantage of the offer of reinstatement. Contrary to petitioner's assertion, he is in fact now "in the same position he would have been in had the unjustified or erroneous personnel action not taken place" (Pet. 9 (quoting *Bush*, slip op. 21)); he has been lawfully discharged because, subsequent to the events that are the subject of the complaint, he was absent without leave.

Petitioner's attempts to distinguish *Bush* are obviously unavailing. Nothing in the language or logic of the opinion in *Bush* suggests that the Court's holding turned on the fact that it involved a First Amendment claim (see Pet. 10) or on a perception that the civil service employee's actions were "motivated by selfish rather than altruistic reasons" (*ibid.*). Petitioner suggests that *Bush* does not control his *Bivens* claim to the extent that that claim rests on the alleged "de facto reduction in rank" because he did not receive an

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[4]Petitioner relies (Pet. 6-7) on *Fucik* v. *United States*, 655 F.2d 1089 (Ct. Cl. 1981), *Hurley* v. *United States*, 575 F.2d 792 (10th Cir. 1978), and *Pauley* v. *United States*, 419 F.2d 1061 (7th Cir. 1969). Those cases address the question whether and under what circumstances a reduction in rank might be said to have occurred even if an employee's grade was not reduced. But in none of those cases had the employees seeking relief been lawfully discharged for reasons independent of the allegedly wrongful reduction in rank; thus, some form of relief remained available to them. Petitioner, by contrast, has been lawfully dismissed for independent reasons, and no relief remains available to him at this point.

administrative hearing on that claim (see Pet. 8-9). But petitioner acknowledges (*id.* at 4) that he was able to present this claim to the CSC; whether the CSC was justified in not holding a hearing is no longer material because, as we have explained, the claim is now moot. The fact that the claim became moot before review of the CSC decision was completed does not mean that the remedy prescribed by Congress is inadequate; it is a feature of many remedial schemes that claims will sometimes become moot before all appeals are exhausted.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

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[5]We note that in *Carroll* v. *United States*, 707 F.2d 836 (5th Cir.), modified on reh'g, 721 F.2d 155 (1983), petition for cert. pending, No. 83-1539, cited by petitioner (Pet. 9), the court of appeals granted rehearing and affirmed the dismissal of the complaint on the authority of *Bush*.

DOJ-1984-05